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Modes of Roman Legal Reasoning in Context: A Brief Survey

Paul J. du Plessis

1. Introduction

When Fritz Schulz published his *A History of Roman Legal Science* in 1946, he began the book by defining its central concept, “Roman legal science”. He wrote:

“We shall use the term ‘legal science’ in a wider meaning than the ordinary. Commonly it is confined to systematic thinking about actual law (legal dogmatics), to the exclusion, in particular, of the law-making processes. So at any rate it has been understood in previous accounts of Roman legal science”¹

In a volume devoted to “principle and pragmatism in Roman juristic argument”, the decision to start this chapter by reflecting on the concept of “legal science” needs little justification. As intimated by the quotation from Schulz, the two topics are related. It would be impossible to address modes of Roman juristic reasoning without also examining this larger issue. Phrased differently, one cannot fully explain *what* the Roman jurists were doing without reflecting on *how* they were doing it (or at least how modern scholars *understand* it) since context is vital for the understanding of history.

Traditionally, “legal science” has been associated with “systematic thinking”, as Schulz shows. Or as Winkel put it: “Rational reasoning and an uncontested systematical approach are important tools for the development of a science.”² Given that Schulz was a Jewish-German émigré who received his training in Germany at the end of the nineteenth century/start of the twentieth century, it goes without saying that Schulz’s intellectual conception of “legal science” was formed against the backdrop of the debates between the Historicist and the Pandectist school of Roman law, prominent in Germany during the late

¹ Fritz Schulz, *History of Roman Legal Science. (Reprinted with New Addenda.)*. (Clarendon Press, 1953), 1.

² Laurens Winkel, ‘The Role of General Principles in Roman Law’, *Fundamina*, 2/3 (1996), 103–20, 105.

nineteenth century.³ This debate, together with its impact on modern understanding of the modes of Roman juristic argumentation, will form the core of this chapter.

Before progressing to the substance of this piece, however, certain observations concerning terminology are required. The terms “principle” and “pragmatism” do not translate well into Latin, even if there is evidence that the underlying ideas were present in the vocabulary of the Roman jurists. Given that these two concepts are associated with “rational reasoning”, to use Winkel’s phrase, it stands to reason that they should be viewed in the context of changes to Roman juristic reasoning from the late Republic to the early Empire. In a survey of Roman conceptions of law, Stein identified a change in juristic method between the “pre-classical” period, mainly the last century of the Roman Republic, and that of the Imperial period, mainly the first century CE. In Stein’s view, commenting here on the modes of legal argumentation in the late Republic:

“By the end of the second century B.C. much of private law was covered by juristic opinions, delivered piecemeal, usually in actual cases, but occasionally in hypothetical cases. The next step was to generalize the opinions, and although the material remained Roman, the methods by which it was organized were Greek (Ref omitted), The key step in passing from the accumulation of particular cases to universals is induction (*epagōgē*). This process produces certain propositions, of which the most basic are so-called definitions (*horoi*).”⁴

A good example of such a “definition”, albeit from a later period, can be seen in the following text by the third-century jurist, Paul, quoting earlier jurists, on the etymology of *furtum*:

D. 47, 2, 1, Paul. 39 ad ed.

³ Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford; New York, 2004), generally. The term “Pandectism” is not without controversy, see Hans-Peter Haferkamp, Klaus Luig and Tilman Repgen, *Wie pandektistisch war die Pandektistik?: Symposium aus Anlass des 80. Geburtstags von Klaus Luig am 11. September 2015*. (Tübingen, 2017), generally.

⁴ Andrea Errera and others, *A Treatise of Legal Philosophy and General Jurisprudence. Volume 7*, 2007 (Peter Gonville Stein ‘The Roman Jurists’ Conception of Law’ 1 - 29), 5.

Furtum a furuo, id est nigro dictum Labeo ait, quod clam et obscuro fiat et plerumque nocte: vel a fraude, ut Sabinus ait: vel a ferendo et auferendo: vel a Graeco sermone, qui φῶρας appellant fures: immo et Graeci ἀπὸ τοῦ φέρειν φῶρας dixerunt.

The references to Labeo, Sabinus, and Greek etymology are all indicative of inductive reasoning. This mode of reasoning came to be supplemented in the first century of the classical period by “deduction”, largely owing to the endeavours of the jurist Labeo. According to Stein, Labeo is responsible for two main innovations in Roman legal thought. The first is the systematic use of analogy as a way to develop law. The second is the deductive mode of legal reasoning:

“Another of Labeo’s innovations was the use of the term *regula* in place of *definitio*. *Regula* (and its Greek equivalent *kanon*) had superseded *analogia* in grammatical discourse to describe the rules of inflection. There was a subtle difference between *regula* and *definitio*. A *definitio iuris*, as understood by Mucius, was essentially descriptive. A *regula iuris* went further; it was a normative proposition which governed all the situations which fell under its *ratio* or underlying principle. It looked to the future as much as to the past.”⁵

It is this deductive mode of legal argumentation that has become inextricably associated with Roman law and with the civilian tradition more generally.

Given the key importance of this mode of legal reasoning, I will therefore define “principle” as a shorthand reference to “reasoning from principle”, in other words, deductive reasoning. But what of “pragmatism”? In order to provide a working definition of this concept for the purposes of this chapter, I will use a famous statement by the Roman jurist Julian in the context of the *lex Aquilia* as demonstration:

D. 9, 2, 51, 2 Iul. 86 dig.

⁵ Errera and others, *A Treatise of Legal Philosophy and General Jurisprudence*. Volume 7, 7.

Aestimatio autem perempti non eadem in utriusque persona fiet: nam qui prior vulneravit, tantum praestabit, quanto in anno proximo homo plurimi fuerit repetitis ex die vulneris trecentum sexaginta quinque diebus, posterior in id tenebitur, quanti homo plurimi venire poterit in anno proximo, quo vita excessit, in quo pretium quoque hereditatis erit. eiusdem ergo servi occisi nomine alius maiorem, alius minorem aestimationem praestabit, nec mirum, cum uterque eorum ex diversa causa et diversis temporibus occidisce hominem intellegatur. quod si quis absurde a nobis haec constitui putaverit, cogitet longe absurdius constitui neutrum lege Aquilia teneri aut alterum potius, cum neque impunita maleficia esse oporteat nec facile constitui possit, uter potius lege teneatur. multa autem iure civili contra rationem disputandi pro utilitate communi recepta esse innumerabilibus rebus probari potest: unum interim posuisse contentus ero. cum plures trabem alienam furandi causa sustulerint, quam singuli ferre non possent, furti actione omnes teneri existimantur, quamvis subtili ratione dici possit neminem eorum teneri, quia neminem verum sit eam sustulisse.

In the underlined portion of this text, which deals with the knotty issue of the quantification of loss, Julian tells us, that there is much in the civil law which does not follow strict deductive logic (*contra rationem*). Nonetheless, the reader is told by Julian, in some instances one must adopt positions which conflict with deductive logic, since a failure to do so would lead to absurd results. Bearing this statement in mind, I will use the following working definition: “pragmatism” signifies deviations from “principle-based reasoning”.

Having established these working definitions, the next logical step would seem to be to investigate the causes of such deviations in principle-based reasoning and to assess whether any patterns (either within the works of one jurist or within the works of a group, such as the Proculians or Sabinians) may be detected in this regard. This would then enable us to draw conclusions about the personalities or academic affiliations of specific jurists. As I hope to demonstrate in this chapter, however, the above-mentioned research strategy has, for various reasons, not borne much fruit. Unlike the majority of chapters collated in this volume, therefore, I do not intend to examine specific cases where the Roman jurists chose to employ “pragmatism” rather than “principle”. It is my belief that such investigations, while useful, fail to appreciate the larger context in which this debate is located. More

specifically, it fails to acknowledge the extent to which the parameters of the topic have been preconfigured by late nineteenth-century debates concerning “legal science”. To that end, I wish to focus on the intellectual context surrounding these two concepts and to demonstrate how this influences our understanding of the activities of the Roman jurists.

2. The origins of “science”

In the quotation from Schulz at the start of this chapter, mention is made of the traditional conception of “legal science” which was confined to “systematic thinking about actual law (legal dogmatics) ...”. Since “scientification” as an intellectual process is commonly associated with the late nineteenth century and the pervasive impact of the natural sciences also upon European legal scholarship, we must turn attention to an important debate that took place between prominent German scholars of Roman law towards the end of the nineteenth century.⁶ The debate about “legal science” did not occur in isolation. It was part of a general trend, visible across many academic disciplines in Germany during the late nineteenth century, in which scholars attempted to improve the quality of their discourse by adopting more rigorous methodologies in relation to sources and their interpretation.⁷ Nowhere is this more visible than in the discussions about the nature of historical research centred around the German historian, Leopold von Ranke. This debate also affected Roman law, especially in the context of the ongoing efforts to create a civil code for a newly united German Empire. Because of this contemporary aspect to the debate, two issues were extensively debated, namely how the Romans made law, and whether they developed any theory about legal norms and their hierarchy.

It is not my intention to present a full picture of the two dominant scholarly positions in this chapter.⁸ Suffice it to say that one group, the Historical School headed by Savigny, “... displaced the natural law school, and saw a return to the historical approach to the Roman law in order to understand the evolution of legal institutions.”⁹ The root of Savigny’s criticism of codification may be summarised as follows:

⁶ Tomasz Giaro, ‘Legal Tradition of Eastern Europe. Its Rise and Demise.’, *Comparative Law Review*, 2 (2011), 1 - 23, 6.

⁷ Frederick C Beiser, *The German Historicist Tradition* (Oxford, 2015), generally.

⁸ For a survey, see Peter Stein, *Roman Law in European History* (New York, 1999), 116 - 20.

⁹ A. Arthur Schiller, *Roman Law Mechanisms of Development* (The Hague; New York, 1978), 4.

“What he [Savigny] opposed was the disposition to liken law to a system of mathematics that can be deduced from axioms, an analogy that appealed to those who saw in codification the universal remedy for all defects in a legal system. Savigny argued that the character of law is rather like that of language, about which rules can be formulated but whose complexity can never be fully expressed by such rules.”¹⁰

As is well known, Savigny’s opposition to codification did not win the day and the German civil code came into force in 1900. Intellectually, however, the disciples of Savigny and of the Historical School made a significant contribution to the concept of “legal science”. This occurred via an offshoot of the Historical School, known as the Pandectists, who according to Schiller:

“... employed the systematic structure of the law which had been worked out a century earlier, developed the whole complex of legal rules and institutions to fit the emerging modern life, largely on the framework of the historical development of institutions which had been worked out by the efforts of their teachers; a system of law which resembled that of the natural law school in that it purported to take care of any novel legal situation that might arise.”¹¹

The approach of the Pandectists was based on the idea of law as a “system”, in other words a fully worked out set of legal rules spanning all of Roman private law that fit together seamlessly and without any gaps, and which could be applied, using the principle of analogy, to any new legal scenario that may arise.¹² It does not take much to appreciate that for such a “system” to function, one needed, in the words of Winkel, both “rational reasoning and an uncontested systematical approach.” What this meant, in practical terms, for how Pandectist scholars approached Roman law, is best viewed through the lens of satire.

¹⁰ Shirley Robin Letwin, *On the History of the Idea of Law* (Cambridge, 2009), 185.

¹¹ Schiller, *Roman Law Mechanisms of Development*., 5.

¹² Kaius Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (Frankfurt am Main, 2007), 21 - 70.

Rudolph von Jhering, a prominent contemporary critic of Pandectism, satirised their methodology as follows. Jhering's criticism of the intellectual approach of the Pandectists was threefold.¹³ The first point of criticism related to the Pandectist conception of "legal science" and its boundaries.¹⁴ He wrote:

"Life, as you know it, is synonymous with death for true science. It is bondage to science and compulsory servitude to concepts that, instead of living for themselves as required, are harnessed to the most degrading yoke of dependence upon earthly existence. Here the concepts live for themselves, and if you don't want to cut off your prospects completely, don't ask anyone about the utility of anything you see. Utility! It would be the last straw if the concepts were also useful in our heaven. Here they reign and compensate themselves for the drudgery and servitude they had to suffer on earth."

The point is clear. The Pandectist conception of "legal science" was exceedingly narrowly drawn. Specifically, "true science" could only be practised by wholly separating it from real-world concerns. Legal concepts, according to the Pandectists, "live for themselves" without any reference to their "utility" which, as we shall presently see, was a particularly important concept in the context of this debate.

This separation between "true science" and the real world served a very specific purpose in Pandectist legal thought, according to Jhering:

"And, this separation between theory and practice is one of the greatest contemporary achievements. Only because of it has science won the complete freedom of movement that is essential to the interest of investigating truth. ... However, all this has only been possible since theory has been completely emancipated from practice and has finally become independent. For the condition of this free dialectical, creative activity is the prevention of every contact with practical

¹³ See also Rudolf von Jhering and Okko Behrends, *Ist die Jurisprudenz eine Wissenschaft?: Jherings Wiener Antrittsvorlesung vom 16. Oktober 1868* (Göttingen, 2009), generally.

¹⁴ Rudolf von Jhering, 'In the Heaven for Legal Concepts: A Fantasy', *Temple Law Quarterly*, 58 (1985), 799–842, 807.

life, which exerts the same pernicious influence on theoreticians that in the judgment of an expert, war exerts on soldiers. In this respect, the highly praised Roman jurists, who during their lives often allowed themselves to be led by insipid utilitarian principles, serve as a warning. You will not find any of them in our heaven. The abolition of sentencing faculties has eliminated the danger of contact with life for our modern jurisprudence.”¹⁵

While it is difficult not to read this statement against the backdrop of the changing role of Roman law in German law schools post codification, Jhering’s point is a broader one. By removing any link between “true [legal] science” and real-world concerns, scholars became liberated to debate legal concepts in a timeless manner and without dwelling on the fact that Roman law was a functioning legal order, the rules of which must have been applied with regularity to the inhabitants of the Roman empire. Another consequence of this approach was that, in the spirit of “legal science”, aspects of Roman law could be problematised beyond reason. In a particularly scathing part of Jhering’s critique, he attacks the method of the Pandectists, known as “construction”, whereby unexpressed principles of law latent in the Roman legal material could be created:

“ ‘This one is the construction machine. We are lucky to find it in operation right now. We’ll soon see what the spirit who works it has in mind.’ ‘Exalted spirit, permit me to ask you what you are doing at the moment?’ ‘I am constructing a contract.’ ‘A contract? That’s so simple. What else can be constructed on the machine?’ Just because it is so simple, a lot! You must be a neophyte here or you would know that. The art of construction derives its most interesting and rewarding objectives from the simplest things. Everyone can understand simplicity, but understanding comes later. The expert knows that the simplest legal phenomena involve the greatest difficulties.”¹⁶

¹⁵ von Jhering, ‘In the Heaven for Legal Concepts’, 799–842, 825.

¹⁶ von Jhering, ‘In the Heaven for Legal Concepts’, 799–842, 807.

Jhering, an early proponent of legal realism, fervently objected to this approach. As Letwin puts it, according to Jhering, "... their [Pandectists] talk about legal logic and the science of law had no connection with real life... ." ¹⁷ But do these "real-world" concerns matter? After all, as Pandectism and its successor, Legal Positivism, have shown, it is perfectly possible to debate rules of law in the abstract without giving any thought to such matters. As I hope to show in the remainder of this chapter, however, it is impossible to examine the modes of reasoning of the Roman jurists solely using a Pandectist (or indeed Legal Positivist) lens.

3. Modes of legal reasoning

The narrowness [or not] of one's conception of "legal science" will affect one's view of the nature of Roman legal reasoning as well as the modes that were employed. More specifically, it will also colour one's view on the impact of external influences upon these modes of reasoning. Given the pervasive impact of, first, Pandectism and thereafter its successor, Legal Positivism, upon all branches of research into civil law during the first part of the twentieth century, it comes as little surprise that research into Roman juristic reasoning and its modes was almost non-existent during this period. ¹⁸ The reasons for this may be traced back directly to the intellectual aims of the Pandectists. If the chief purpose of Roman law was to create modern legal provisions in a civil code, there could be no room for ambiguity. Furthermore, as long as the prevailing legal theory is one that endorses law as the product of the lawgiver (the state), there is little room for debate about the origins or indeed the authors of those rules of law. The consequence of this was that Roman legal reasoning as contained in the texts collected in the Digest became unimportant and was replaced by axiomatic and unambivalent rules of law. In addition, if these rules of law had to form a "gapless system", juristic controversies had to be smoothed over in order to create one clear position on each issue. This reduction of Roman juristic controversies to axiomatic rules of law with little regard for the authors of these statements or indeed their modes of reasoning came to be known in German legal scholarship as the doctrine of "Fungibile

¹⁷ Letwin, *On the History of the Idea of Law*, 188.

¹⁸ Winkel, 'The Role of General Principles in Roman Law', 103–20, 107.

Personen" (interchangeable persons) – where the author or book from which the relevant Digest passage was taken, was ignored.¹⁹

4. A Post-War Revival

The scholarly debate concerning the modes of Roman legal reasoning, from Viehweg's work, published in 1953, to Winkel's survey article on the topic in 1996, is well explored and need not be picked over in detail. It is worth pointing out, as Winkel has done in his article, that this revival occurred within the context of renewed interest in the work of Emmanuel Kant. In this section, I will highlight some of the insights which have emerged from this debate. The first notable insight, by Winkel, concerns the way in which the Roman jurists dealt with "sources of law":

"A theory about the sources of law, however, had hardly been developed in Roman law. This is the reason why topical arguments play a much more important role than we can imagine. For the continental jurist nowadays a hierarchy of juridical norms is quite self-evident. Fixed rules of interpretation were unknown in Roman jurisprudence. The juridical system is a very open one, much more so than in modern times."²⁰

The second insight concerns the theoretical bases of the Roman jurists' reasoning. As Honoré observed already in 1974:

"The Roman jurists probably had no conscious theory about the way in which they reasoned. This does not prevent us from trying to give a systematic account of what they were doing, any more than the fact that in ordinary speech the notion of 'cause'

¹⁹ On this entire debate, see the chapters collected in Christian Baldus and others, eds., *Dogmengeschichte und historische Individualität der römischen Juristen = Storia dei dogmi e individualità storica dei giuristi romani: atti del seminario internazionale (Montepulciano 14-17 giugno 2011)* (Trento, 2012).

²⁰ Winkel, 'The Role of General Principles in Roman Law', 103–20, 105.

is used unreflectively prevents us from giving a systematic account of the principles on which that unreflective use rests.”²¹

Although the Roman jurists may not have had a conscious “theory” of their own legal reasoning, it is certainly possible to discern different types of argument. Based on the work of Viehweg²² (1953) and that of Horak²³ (1969), Honoré identified at least five different types of argument used by the Roman jurists. That being said, as his discussion - together with the other contributors to the debate - have shown, there is very little consistency, even within the work of one jurist, to draw any meaningful conclusions, especially concerning “patterns” or the propensity of certain jurists to use certain types of reasoning. In addition, as Honoré’s discussion has demonstrated, it is not the deductive arguments that have been the subject of debate among modern Romanist scholars. Rather, it has been the “open argument” using *topoi*, another one of the five types, that has been the main source of modern scholarly controversy, primarily because of the different interpretations of modern scholars concerning the extent to which these open argument allows the jurists to introduce “social values” such as good faith and utility into their arguments.

There are two further insights of Honoré’s, that are worth noting. First, according to Honoré, the Roman jurists had “a canon of acceptable arguments”.²⁴ This set them apart from, say, the Greeks who utilized a wider range of arguments in their legal discourse than is visible in Roman law. In second place, according to Honoré, the Roman jurists over time developed “... conventions about the range of acceptable open arguments” as a result of their “professionalization” as a group.²⁵ These two points, in my opinion, should form the backbone of any further investigations into the modes of Roman legal reasoning. More specifically, the relationship between the Roman jurists as a profession and larger societal concerns deserve close scrutiny. After all, as Honoré has observed:

²¹ Anthony (Tony) Maurice Honoré, ‘Legal Reasoning in Rome and Today’, *Cambrian Law Review*, 4 (1973), 58–67, 86.

²² Theodor Viehweg, *Topik Und Jurisprudenz. (Habilitationsschrift.)*. (München, 1953).

²³ Franz Horak, *Rationes Decidendi: Entscheidungsbegründungen Bei Den Älteren Römischen Juristen Bis Labeo* (Aalen, 1969).

²⁴ Honoré, ‘Legal Reasoning in Rome and Today’, 58–67, 91 – 92.

²⁵ Honoré, ‘Legal Reasoning in Rome and Today’, 58–67, 92.

“Given, then, intellectual professionalism, it is possible for certain issues to be considered not in isolation from the moral, social, political and religious issues affecting society at large but in such a way that these are allowed to be taken into account only on certain terms and within certain limits.”²⁶

The link between the reasoning of the Roman jurists and these larger societal concerns is important. As Watson pointed out in 1972:

“[A]t least sometimes, the Roman jurists were more concerned to reach a sensible practical result than to follow the dictates of a rigorous logic, that they were not ivory-tower philosophers but sensible men dealing with contemporary problems of living. Though it may be felt that this diminishes the claims of Roman law to be a system of universal unchanging validity, it must make us accept the Roman jurists as individual human beings. And we must give credit to their sophistication.”²⁷

What remains, therefore, is to determine how to deal with the modes of argumentation of the Roman jurists “as individual human beings”. One thing is clear, since – with a few exceptions – the real-world impact of the Roman jurists’ arguments cannot be ascertained, a different approach is necessary.²⁸ A popular line of investigation pursued in the past decade has been to investigate the examples of Roman juristic reasoning for signs of patent and latent influences from either philosophy or rhetoric.²⁹ This has been done because, so the argument goes, the jurists would have been well versed in these two branches of knowledge as a result of their education. Thus far, however, the results of such investigations have been less than promising. The conclusions reached in the

²⁶ Honoré, ‘Legal Reasoning in Rome and Today’, 58–67, 92.

²⁷ Alan Watson, ‘Illogicality and Roman Law’, *Isr. Law Rev. Israel Law Review*, 7/1 (1972), 14–24, 24.

²⁸ For a rare instance where this is possible, see BGU II 613 where, in a petition, the opinion of L. Volusius Maecianus is presented.

²⁹ Tessa G Leesen and Gaius, *Gaius meets Cicero law and rhetoric in the school controversies* (Leiden; Boston, 2010).

most recent surveys of Giltaij³⁰ (on philosophy) and Kacprzak³¹ (on rhetoric) are well worth reading in this regard.

Is there an alternative option? Recent studies in “law and society” might well provide the way ahead.³² They cannot, however, end with the now well-rehearsed conclusion that “law in books” differ from “law in action”. Rather, the matter will have to be addressed from a different perspective, such as “legal culture” and the relationship between “centre and periphery” when dealing with legal knowledge. As Bryen has recently remarked:

“... the consequence of the last decade’s new work in Roman legal history is that we now have to accept that the legal order as a whole was the product of the participation of many more actors than previous generations of scholars had been prepared to account for, and that these actors’ participation in creating a legal culture was not necessarily predicated on their somehow consciously replicating official narratives, which were themselves often shifting and inchoate.”³³

5. Conclusions

On balance, there is little to be gained from a Pandectist discourse concerning the modes of legal argumentation of the Roman jurists. Both the Pandectists and their intellectual successors, the Legal Positivists, were not interested in juristic controversies. Rather, they were focused on creating unambiguous rules of law, freed from any context and with a sufficient level of abstraction to be utilized across time and space. The downside of this approach, as pointed out by early legal realists such as Jhering, was that the rules themselves became “otherworldly” and without any thought being given to their “utility” in the real world. In order to understand the modes of reasoning of the Roman jurists,

³⁰ Paul J. du Plessis, Clifford Ando and Kaius Tuori, *The Oxford Handbook of Roman Law and Society*, 2016 (Jacob Giltaij 'Greek Philosophy and Roman Law: A Brief Overview.' 188 - 199).

³¹ Plessis, Ando and Tuori, *The Oxford Handbook of Roman Law and Society* (Agnieszka Kacprzak 'Rhetoric and Roman Law.' 200 - 217).

³² Plessis, Ando and Tuori, *The Oxford Handbook of Roman Law and Society* (Janne Pölönen 'Framing "Law and Society" in the Roman World' 8 - 21).

³³ Ari Z Bryen, 'Law in Many Pieces', *Classical Philology* 109/4 (2014), 346–65, 357.

therefore, a jurist-focused approach is required. This necessarily involves an acceptance that the Roman legal order was different from a modern legal system. It was a more “open” system, as Winkel has shown, which did not have a hierarchy of sources or, indeed, a theory of legal argumentation. It is this “openness” that should form the basis of any further discussions concerning modes of argumentation of the Roman jurists. And when it comes to “openness” context matters.